No. 12,217

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL H. KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

HENRY STEINBERG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BEN DOBBS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal, the judgments on appeal herein having been filed February 4, 1950.

I.

Preliminary Statement.

This Court by its Amended Opinion filed February 4, 1950, reversed judgments in *criminal* contempt sentencing each appellant herein to one year in jail for refusing to answer certain questions before the grand jury and ordered the proceedings below dismissed "as to the questions other than those concerning Mr. and Mrs. Healy." As to those questions the cases were remanded and the District Court ordered to admit evidence tendered with respect to their believed connection with the Communist Party.

On the same day, February 4, 1950, this Court filed its amended opinions respectively in the cases of *Alexander et al. v. United States,* No. 12,081, and *Doran et al. v. United States,* No. 12,221, in each of which judgments and commitments in *civil* contempt were reversed and the proceedings ordered remanded for specified further proceedings as to certain of the appellants.

These latter two cases will become moot on March 15, 1950, at which time the extended term of the grand jury before which the appellants appeared will have expired. For the purposes of further proceedings before the grand jury those two cases are therefore considered moot and the questions therein raised on the merits are now academic.

This case, being an appeal from a judgment in *criminal* contempt, is not moot and is distinguishable from the *civil* cases. The Amended Opinion in the instant case, however, is predicated on the "reasons stated in the *Alexander* and *Doran* cases" (Amended Opinion p. 2).

This petition for rehearing is made upon the ground that the Amended Opinion herein rests upon certain prem-

ises (some of which are contained in the *Alexander* and *Doran* Amended Opinions) which appear to be in error as will be set forth hereinbelow with particularity.

This petition for rehearing is made upon the further ground that the opinion herein should properly be separate and apart from the opinions in the *Alexander* and *Doran* cases and should be predicated upon premises applicable to the record in the instant case as distinguished from the inapplicable matters contained in the *Alexander* and *Doran* Amended Opinions.

II.

The Court in Its Amended Opinion Erroneously Asserts That "These Questions Were Asked in Continuation of the Questioning of Them in the Alexander Cases."

By stipulation of the parties and upon order of this Court the appeals and the records in the instant cases and the *Doran* cases were "consolidated for the purpose of appeal" [R. 143-144].

Also by order of the District Court in the proceedings hereinbelow the matters of defense offered by appellant Dobbs were incorporated as defensive matter in behalf of all the appellants herein [Kasinowitz, R. 345, 434; Steinberg, R. 345, 440-1].

However, it is apparent from the stipulation, from the order of the Court below, and from the questions herein involved, that it was not conceded by the Government, nor was it contended by anyone concerned, that the questions with which the instant appeal is concerned were a continuation of the questioning of the appellants in the *Alexander* cases. In those cases the appellants herein were questioned

about their knowledge of the organization of the Los Angeles County Communist Party [Kasinowitz, R. 225-226; Steinberg, R. 207-208; Dobbs, R. 215-216].[1]

The questions with which the instant appeal is concerned are on their face plainly directed, not to the knowledge the witnesses might have of the Los Angeles County Communist Party or its organization, *but solely to the knowledge of the witnesses as to the whereabouts of a person whom the grand jury desired to locate, subpoena and bring before them to testify.*

III.

The Court by Its Amended Opinion Has Injected the Erroneous Inference That There Are Involved Herein Questions Other Than Those Concerning Mr. and Mrs. Healy.

On page two of its Amended Opinion in the instant case the Court states as follows:

> "The judgments are reversed and the proceedings below against the appellants are ordered dismissed *as to the questions other than those concerning Mr. and Mrs. Healy.*"[2]

The appellants were asked no questions in this case other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 225; Steinberg, R. 234-235; Dobbs, R. 217].

The appellants were ordered by the District Court to answer no questions other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 228; Steinberg, R. 238; Dobbs, R. 212].

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[1]References are to the *Alexander* record.

[2]Italics added.

The presentments, respectively, charged the refusal to answer no questions other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 2; Steinberg, R. 5; Dobbs, R. 8].

It is respectfully submitted, therefore, that the Amended Opinion of this Court so far as it orders the dismissal "as to the questions other than those concerning Mr. and Mrs. Healy" creates a serious ambiguity, is meaningless and makes uncertain the judgment and opinion of this Court.

IV.

The Amended Opinion of the Chief Judge "Individually Supplementing the Court's Opinion" Rests Upon Erroneous Considerations Which Have No Application to This Case, as Should Be Made Clear by the Opinion in This Case.

A. The individual supplement to the Court's Opinion in the *Alexander* case refers to, "a published press release of the Department of Justice, dated June 15, 1945 *(sic)*"[3] which "describes the cases pending in this Court as a part of 'the prosecution * * * against communists in the United States.' "

The record in this case and in the *Alexander* and *Doran* cases is barren of any such press release. On its face the reference press release is erroneous because it purports to be a statement made in 1945 referring to the proceedings involved in this case; these proceedings were not commenced until more than three years later, that is to say in October, 1948.

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[3]Added.

B. The individual supplement to the Court's Opinion refers to the magazine "Look" on August 30, 1949, as the source of the Attorney General's opinion upon which the Court relied. That a non-official publication, of any sort, is hearsay and unreliable for the establishment of the truth of any matter of fact therein alleged seems clear. That a publication of the character of Look magazine should be raised to the dignity of official recognition by a United States Court of Appeals as the medium of official pronouncement by a Cabinet officer is to accept as authoritative and permissible a form of evidence which is repugnant under the rules of any court. To accept from outside the record facts gleaned from such a source and to take them as true for the purpose of grounding an opinion on appeal in this Court is to set a precedent which we respectfully urge the Court should disavow.

It should be added further that the issue of Look magazine upon which the Court relied bore a date subsequent to the end of all proceedings in the Court below, was dated after the appeal herein was ordered submitted, and was published at a time when the Attorney General whose views it purported to express was thereafter constrained to remain silent, by reason of his elevation to the office of Associate Justice of the Supreme Court of the United States.

C. The individual supplement to the Court's Opinion recites that February 4, 1950, was the last day of the term of the grand jury in the *Alexander* civil contempt cases and that failure to decide that case on that day would result in it becoming moot. The records of the District Court for the Southern District of California reflect that the term of the grand jury in the *Alexander* cases (being

the same in this case and the *Doran* case) has not yet, as of March 1, 1950, expired. We respectfully agree, however, that for the purposes of the *civil* contempt cases (*Doran* and *Alexander*) the matter is in a practical sense moot because the judgments therein provided that the witnesses be committed until they returned to the grand jury and answered the questions. At the end of the grand jury's term on March 15, 1950, the appellants in the civil cases could no longer be in contempt.

The Amended Opinion in the instant case adopts "the reasons stated in the *Alexander* and *Doran* cases" (p. 2). We respectfully urge that the reasons intended to apply should be stated.

V.

The Amended Opinion of the Court Is Uncertain and Ambiguous Insofar as It Orders the District Court to Admit the Evidence Tendered With Respect to the Believed Connection of Mr. and Mrs. Healy, With the Communist Party.

It is noted that Judge Pope concurs in the result only in this case "and with the reservations noted in my concurring Opinion in *Alexander v. United States of America,* No. 12,081" (p. 2). Included in the reservations noted were those pertaining to the propriety of admitting or requiring evidence of the prosecutor's plans, as stated by Judge Pope, at page 15, of the *Alexander* Amended Opinion:

> "* * * My own Opinion is that it would be intolerable interference with the work of the United States Attorney if he must be subjected to an inquisition as to his plans and purposes in respect to future prosecutions merely because some recalcitrant witness chooses to test his constitutional privilege. I think it is not in the public interest. * * *"

Similarly, Judge Pope on the same page in the *Alexander* Amended Opinion, noted his reservation in regard to the admissibility of newspaper articles:

> "I think the approval of the newspaper articles is particularly unfortunate."

All of the matters offered to be proved by the appellants herein fell within the reservations noted by Judge Pope. The matters offered to be proved consisted of:

(a) Testimony of the prosecutor as to information in his possession regarding the purposes of the grand jury.[4]

(b) Excerpts from a publication described as the findings of the Joint Fact Finding Committee on un-American Activities of the California Legislature.[5]

(c) Los Angeles newspaper reports of alleged statements by the prosecutors.[6]

Since three judges other than Judge Pope dissented in the present case, and since by his reservations noted in the *Alexander* case, Judge Pope appears to have dissented from the Court's Amended Opinion with regard to the admissibility of all the proffered evidence, it appears not to be the judgment of a majority of the Court that the proffered evidence be admitted upon remand to the District Court. We respectfully urge that the order directing the District Court with respect to the admission of evidence, if any, should be clarified.

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[4]R. 257-261, 277-279, 364-366.

[5]R. 285.

[6]R. 302, 304.

Conclusion.

Upon the foregoing grounds it is respectfully submitted that a rehearing should be granted, that this case should be decided upon the basis of the seven questions, all pertaining to Mr. and Mrs. Healy, which were asked of appellants and that upon a remand, if any, to the District Court, that Court be directed with particularity as to the proffered evidence, if any, which should be admitted.

Respectfully submitted,

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United States Attorney,

ROBERT J. KELLEHER,
Assistant U. S. Attorney,

Attorneys for Appellee.

Certificate of Counsel.

We, Ernest A. Tolin, United States Attorney, and Robert J. Kelleher, Assistant United States Attorney, attorneys for the Appellee hereby certify that in our opinion the above petition for rehearing is well founded and is not interposed for delay.

ERNEST A. TOLIN,
United States Attorney.

ROBERT J. KELLEHER,
Assistant U. S. Attorney.